



INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
OAKLAND CITY UNIVERSITY--
OAKLAND CITY



DUNCAN V. M&M AUTO SERVICE, INC.

Appeal from:

Vanderburgh Superior Court,
The Honorable Robert J. Pigman,
Judge

Oral Argument:

Wednesday, October 29, 2008
1:30—2:30 p.m.
30 minutes each side

TORT LAW

Whether, in a negligence lawsuit arising out of a gas tank explosion, there is enough of an issue to permit the case to proceed to trial when the victim's expert witness first stated a valve that might have prevented the accident was required by industry standards but then changed his statement to say the installer of the system "may have known" the valve "would be important to have."

CASE SYNOPSIS

Facts and Procedural History

Richard Duncan sued M&M Auto Service, claiming he was injured due to M&M's negligent installation and maintenance of a compressed natural gas ("CNG") system in his employer's van. The trial court granted summary judgment for M&M.

Duncan worked for the Southwestern Indiana Regional Council on Aging. The Council owned a van equipped to run on natural gas. M&M installed the CNG system in the van in 1997 using a fuel conversion kit Jasper Engine had assembled with parts from various sources. M&M also did some work on the CNG system. On May 11, 1998,

found it within specifications. M&M recalibrated the CNG system, replaced the air filter, and performed a road test.

On January 14, 1999, Duncan was filling the natural gas tank when gas escaped and caused an explosion. Later that day the Council took the van to M&M, complaining of a leak. M&M checked the CNG system and did not find any leaks, but replaced an 'O' ring as a precautionary measure.

The kit M&M installed had a check valve so natural gas would flow in only one direction. David L. Zedonis, an expert Duncan retained, believed debris had caused the check valve to stay open, allowing the gas to escape.

DUNCAN V. M&M AUTO SERVICE, INC.**CASE SYNOPSIS**

Zedonis said in his affidavit that governing standards of the National Fire Protection Association for CNG systems required a second, redundant check valve, which should prevent gas from escaping if the first valve fails. But after reviewing the standards in more detail, Zedonis amended his affidavit to state a redundant check valve was not required, but was good design practice.

Zedonis said in his first affidavit that M&M “should have known” a redundant valve was required, but later stated M&M “may have known” the redundant valve “would be important to have.” Zedonis described the standards as minimum requirements and said a redundant check valve would have prevented the accident.

The trial court granted summary judgment for M&M, concluding the change in Zedonis’ opinion was “fatal” to Duncan’s claim.

The Parties’ Arguments

Duncan makes three arguments why M&M should not have been granted summary judgment:

1. Specific Designation

Duncan first argues M&M should not have won summary judgment because it did not designate its evidence specifically enough. Parties requesting summary judgment must designate the evidence on which they rely. The purpose of the requirement is to save the trial court from having to search the record to find support for a party’s claim.

2. Strict Liability

A product liability action based on strict liability may be brought against a seller of a product, but only if the seller is a manufacturer of the product or of the part of the product alleged to be defective. Duncan argues that there is evidence M&M is an “apparent manufacturer.” One who puts out as his own product something manufactured by someone else may be subject to the same liability as the manufacturer.

3. Negligence

Finally, Duncan alleges M&M was negligent in the installation and/or maintenance of the CNG system.

TODAY'S PANEL OF JUDGES

Hon. John G Baker (Monroe County), Chief Judge, Presiding

- **Judge of the Court of Appeals since June 1989**

Chief Judge **John G. Baker** is originally from Aurora in Dearborn County and now resides in Boone County. Previously he lived in Monroe County for 35 years. Since June 1989, he has served as a Judge of the Indiana Court of Appeals representing the First District and has authored more than 3,000 majority opinions. Prior to becoming an appellate court judge, he served as county court and superior court judge for 13½ years in Bloomington, disposing of more than 15,000 cases.

Judge Baker graduated from Culver Military Academy and received his A.B. degree from Indiana University in 1968 in History and his J.D. from the Indiana University School of Law — Bloomington in 1971. He received his LLM in Judicial Process from the University of Virginia in 1995. Before assuming the trial bench, he was a partner in the firm of Baker, Barnhart, and Andrews in Bloomington and was a Captain in the U.S. Army Reserves.

Since 1980, Judge Baker has taught as an adjunct professor at Indiana University's School of Public and Environmental Affairs and for three years at the School of Law in Indianapolis. In addition, Judge Baker has served on the faculties of the Indiana Judicial College, Indiana Continuing Legal Education Forum,

and the National Institute of Trial Advocacy.

His professional associations include the American, Indiana State, Monroe County and Indianapolis Bar Associations. For the latter, he served as Vice-President in 1995. He has been a member of the Indiana Judges Association's Board of Managers continually since 1979 and served as its President from January of 1987 through June of 1989.

Judge Baker has been active in community and civic affairs as well. In addition to his church, YMCA, and other similar organizations, Judge Baker has been active in Boy Scouts of America since his youth and was awarded the rank of Eagle Scout.

Judge Baker, who was retained on the Court by election in 1992 and 2002, lives near Zionsville with his wife, Margaret (Peggy) Paul Baker. They have five children and, so far, five grandchildren.

"Appeals on Wheels"

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

The Court of Appeals has held over 200 "on the road" cases since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Melissa S. May (Vanderburgh County)

- Judge of the Court of Appeals since April 1998

Melissa S. May was appointed to the Court of Appeals in April of 1998. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been the co-chair of ICLEF's Indiana Trial Advocacy College from 2001-2005. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and

she is a Master Fellow of the Indianapolis Bar Association.

From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctorate of Civil Law from the University of Southern Indiana.

The 15 judges of the Indiana Court of Appeals issue more than 2,800 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Elaine B. Brown (Dubois County)

- **Judge of the Court of Appeals since May 2008**

Elaine B. Brown, of Jasper, was appointed to the Court of Appeals by Gov. Mitch Daniels and took her seat on May 5, 2008. A native of Ferdinand, Judge Brown has lived her entire life in southern Indiana. She is the mother of two adult children.

Before joining the Court of Appeals, Judge Brown was a trial court judge for 15 years, as well as an attorney in private practice. She served as judge of the Dubois Superior Court from 2005 to 2008 and from 1987 to 1998. In the years between her tenure on the bench, she maintained a solo practice in Jasper and was a senior attorney with Fine & Hatfield in Evansville. Earlier in the 1980s, she practiced law with the firm of Thom & DeMotte in Jasper.

Judge Brown was salutatorian of the class of 1972 at Forest Park High School in Ferdinand. She earned a bachelors degree with distinction from Indiana University in 1976, and her J.D. from the IU School of Law in Bloomington in 1982. She was a teacher in the Greater Jasper Consolidated School Corporation for three years before she entered law school, teaching fine arts to students in grades K through 12.

A large part of Judge Brown's professional focus during her years on the bench has been a commitment to improving the lives of the citizens of Dubois County by addressing substance abuse issues of both individuals and families. In 2007, she initiated a new countywide alcohol and drug program and administered it through the Superior Court, a program similar to the Dubois Court Alcohol and Drug Services Program, for which she was president from 1987 to 1992. In 2005, she created the county's Drug Court. From 2006 until her elevation to the Court of Appeals, she also served as president of the Dubois County Substance Abuse Council; for eight years in the 1990s, she served on the executive board of the Dubois Substance Abuse Task Force. In 1997 and 1998, she volunteered with the Dubois County Reach-Out Suicide Prevention Committee. And from 1989 to 1990, she served on the Committee for a Drug Free Jasper.

Since 1998, Judge Brown has been an Indiana Registered Civil Mediator with advanced training. She graduated from the Indiana Judicial College

in 1996. She served for two years on the Board of Directors of the Indiana Judicial Conference and for two years on the Board of Managers of the Indiana Judges Association. She is a former member of the Indiana Supreme Court Character and Fitness Committee as well as the Judicial Administration Committee of the Indiana Judicial Conference. Judge Brown is also a member of the National Association of Women Judges, the American Judges Association, and the Indiana Council of Juvenile and Family Court Judges.

Judge Brown was active as leader in the Brook Inns of Court in Evansville and was an officer for four years of the Dubois County Bar Association, serving as president in 1985. She is a member of the American Judicature Society, the American Trial Lawyers Association, and holds or has held memberships in the American, Indiana State, Dubois County and Evansville bar associations. She served on the Family Law Study Committee of the Evansville Bar Association when she practiced law in that city.

Among her many community activities, she served on the Scott School Improvement Committee and the North High School PTSA Executive Board. She supported the Restore Old Jasper Action Committee and the Dubois County Museum and is a life member of the Ferdinand Community Center. She is a member of the St. Thomas More Society. A 1993 graduate of the Richard G. Lugar Excellence in Public Service Series, she served on that organization's Board of Governors from 1993 to 1998. In 1992, Judge Brown received the Outstanding Young Hoosier Award from the Indiana Jaycees, one year after the Jaycees presented her with a Distinguished Service Award. Judge Brown was the Vanderburgh County Representative for Senator Richard G. Lugar's 2000 campaign. In 1988, she was named Dubois County's Outstanding Republican Woman.

ATTORNEYS FOR THE PARTIES

For Appellant:

Robert R. Faulkner
Evansville



Robert R. Faulkner has been in the private practice of law in Evansville since 1995, having opened his own general practice law office in 1999. He is a member of the Evansville Bar Association and the Kentucky Bar Association and practices in the State of Indiana, Commonwealth of Kentucky, United States District Courts for the Southern and Northern District of Indiana, United States District Court for the Western District of Kentucky,

United States Court of Appeals for the Seventh Circuit and United States Supreme Court. He is a 1982 graduate of Vincennes University, earned a Bachelors degree in Electrical Engineering in 1992 from Purdue University and Juris Doctorate from the IU School of Law-Indianapolis in 1995. He is a native of Vanderburgh County where he and his wife currently reside.

For Appellee, M&M Auto Services:

Fred S. White
Bamberger, Foreman, Oswald and Hahn, LLP,
Evansville

Fred S. White has been with the firm of Bamberger, Foreman, Oswald and Hahn in Evansville, Indiana, since 1975. Prior to that, he was an associate in the firm of Bredell, Martin and McTurnan in Indianapolis, Indiana.

Mr. White graduated from Purdue University in 1966 and he received his law degree from the IU School of Law in Indianapolis in 1972. In 1971-72, he served as a Law Clerk to The Honorable Donald H. Hunter on the Indiana Supreme Court.